SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 979

DANIEL F. BOONE,

Petitioner,

vs.

MARTHA LIGHTNER BOONE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits to your honorable court the following brief in opposition to the petition for a writ of certiorari:

Statement of Matter Involved.

The petitioner, Daniel F. Boone, and the respondent, Martha Lightner Boone, are husband and wife. They have two children, Daniel Lightner Boone, born May 23, 1935, and Martha Penelope Boone, born September 14, 1938. The petitioner and respondent lived together as man and wife in the State of North Carolina until April 13, 1939, when they separated (R. 6).

On April 16, 1941, the petitioner commenced an action in the Superior Court for Forsyth County, North Carolina, against the respondent and filed his complaint alleging the marriage of the parties; their separation on April 13, 1939; that petitioner was, and for more than a year immediately preceding the commencement of the action had been, a resident of the State of North Carolina, and that the custody of the two children of the marriage had been settled by a written agreement (R. 6-7). There was nothing in the complaint about either the petitioner or the children residing in the District of Columbia. The petitioner asked for a divorce from the respondent on the statutory ground of two years separation (R. 7).

The respondent filed answer on May 9, 1941, admitting the allegations as to the marriage and separation of the parties, and that both were residents of North Carolina. As to the separation agreement and the provisions of the same regarding the custody of the children, the respondent alleged numerous acts on the part of petitioner amounting to a breach, and failure to live up to the provisions of the same, and asked the court to adjudicate the custody of the children (R. 8-11).

The case was regularly calendared for trial in Forsyth County, North Carolina Superior Court on June 23, 1941, and the trial commenced on that day and continued until June 24, 1941, when it was continued until July 1, 1941 and concluded on July 2, 1941, at which time a judgment was signed awarding the custody of the two children to the respondent (R. 12-14). The petitioner gave notice of appeal to the Supreme Court of North Carolina but failed to perfect the appeal in accordance with the rules of that Court. To remedy this failure the petitioner filed a petition in the Supreme Court for a writ of certiorari, and upon a denial of the same filed a petition for a rehearing. After this had been denied the respondent gave notice of a motion to dis-

miss the appeal, and after a hearing on said motion, with counsel for petitioner present and opposing, an order was entered on January 7, 1942, dismissing the appeal (R. 3-4). There is nothing in the present record to show the number of days leave of absence the petitioner had from his military duties, or that he had not completed his testimony, or that he advised the North Carolina Court that he changed his domicile after giving his testimony in which he had assured the court that he was a resident of North Carolina, but the record affirmatively shows participation in the proceeding until the final dismissal of the appeal.

After the dismissal of the appeal, the petitioner continued, in violation of the order awarding custody of the children to respondent, to keep the children in the District of Columbia. The respondent thereupon filed her petition for habeas corpus in that jurisdiction on February 5, 1942 (R. 2-14), and the petitioner filed his answer (R. 14-21).

The matter came on for hearing before Judge Bailey on March 5, 1942 (R. 29), and was concluded on March 9, 1942 (R. 23).

The court announced the decision favorable to the mother, set forth on page 22 of the record, and upon findings of fact and conclusions of law (R. 23-27) signed the order granting the writ (R. 27-28).

Upon appeal to the United States Court of Appeals for the District of Columbia the District Court judgment was affirmed (R. 81-82), and petition for rehearing denied on December 22, 1942, (R. 89).

Petition for a writ of certiorari was filed April 30, 1943.

Questions Presented.

1. Where the petitioner commenced an action for divorce in North Carolina on the grounds of two years separation, and alleged that both he and his wife were residents of that

state, and the wife by answer raised the question of the custody of the two children of the marriage, can the petitioner subsequently contend

(a) That the order of the North Carolina Court awarding custody of the children to the mother is void and not binding on him and on the children? (b) That he can relitigate in the Courts of the District of Columbia matters which were fully litigated in the North Carolina Courts? That he has been denied due process of law under the facts in this case?

Summary of Argument.

The argument of the respondent is briefly summarized as follows:

1. That the North Carolina Court had unquestioned jurisdiction of the divorce action and the right to award the custody of the children; that the matter was fully heard and custody of the children awarded to the respondent in accordance with North Carolina laws, and that the attempt on the part of the petitioner to change his residence during the trial in North Carolina and oust the jurisdiction of that court was ineffectual, and that the judgment of that court was rightly upheld in the District of Columbia on principles of comity, decision law, and under the full faith and credit provision of the Federal Constitution.

2. That the effect of the North Carolina judgment was correctly determined and applied in the courts of the District of Columbia in accordance with the local law in North Carolina.

3. That the petitioner's claim of a denial of due process of law is unfounded and the petition presents no question of substance under the provisions of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, and Rule 38, Section 5 (c) of this Court.

ARGUMENT.

Point 1.

The order of the North Carolina Court awarding custody was not an interlocutory order but was a valid judgment of the court, and binding on the husband, wife, and children who were before the court, as to all facts and circumstances at the time of its rendition.

The action in North Carolina was instituted by the petitioner. He voluntarily invoked the aid of the court. The matter cannot be better stated than in the language of the opinion of the United States Court of Appeals for the District of Columbia: "Though appellant now claims residence in the District, he does not contend that he committed perjury when he assured the North Carolina Court that his residence was in North Carolina. That Court had unquestioned jurisdiction of his divorce suit. That Court has jurisdiction pending a divorce suit, to settle the custody of children" (R. 81-82). The North Carolina cases cited state the law in that jurisdiction as follows:

In *State* v. *Duncan*, 222 N. C. 11, 21 S. E. (2d) 822, the Court said: (Quoting from *Story* v. *Story*, 221 N. C. 114, 19 S. E. (2d) 136, 137):"

> "Upon the institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after the final decree of divorce. C. S. 1664; Tyner *v.* Tyner, 206 N. C. 776, 175 S. E. 144; Sanders *v.* Sanders, supra (167 N. C. 319, 83 S. E. 490).

Having invoked the jurisdiction of the North Carolina Court it is respectfully submitted that the petitioner cannot escape the finding of fact by the trial court, "that the

plaintiff, the defendant and the said children are residents of the State of North Carolina" (R. 12) or that of the District Court in the District of Columbia, "that the removal of said children and of respondent (petitioner) to said temporary residence in the District of Columbia did not affect or change the domicile of said respondent (here the petitioner) or said children in said Forsyth County, where the suit relating to the custody of said children was pending for hearings and decision, and where said suit was later brought to a hearing and decided on July 2, 1941" (R. 25).

While the petitioner made an elaborate effort to change his residence on June 23, 1941, after having testified that day that his residence was in North Carolina, it does not appear that he made this fact known to the court while he undertook step by step to appeal to the Supreme Court, to obtain a writ of certiorari, and after a denial filed a petition for a rehearing. Petitioner's participation and opposition continued in the North Carolina Courts until the final dismissal of his appeal before Judge Armstrong on January 7, 1942 (R. 3-4). It must be assumed that petitioner would have claimed the benefit of a favorable decree. Can he set at naught an unfavorable decree? We respectfully submit that he cannot.

The questions which the petitioner sought to litigate in the District of Columbia are clearly shown by the record to be the same questions which were before the North Carolina Court. There is no allegation that there are any new facts which were not brought out before the North Carolina Court where the judgment clearly indicates that petitioner had made charges against the character of his wife and had charged her with adultery (R. 13). The court ruled that the charges had not been established (R. 13). Upon what theory should the petitioner have been permitted to urge the same charges in the Courts of the District of Columbia? For litigants to present the same questions over and over

and ask for new decisions is contrary to all established rules of American jurisprudence.

The North Carolina Court, as shown above in the recent cases cited from the Supreme Court of that state, had the right either before or after the disposition of the divorce case to award the custody of the children. Under this rule vanishes the claim of any benefit by petitioner that "the principal issue in the North Carolina action (divorce) is still pending for trial" (Petitioner's Brief 12).

As to the benefit claimed by petitioner that the North Carolina order is not final, we disagree with the petitioner's position and respectfully submit the following authorities and reasons:

The principle established by the great weight of authority is to the effect that when an award of custody is made by a court of competent jurisdiction, such award is final and conclusive as to all matters involved, and comes within the full faith and credit clause of the Federal Constitution.

See cases cited in annotations in 20 A. L. R. 815, 72 A. L. R. 441 and 116 A. L. R. 1299.

In the case of *Rosenberger* v. *Rosenberger,* 95 F. (2d) on page 350, Justice Miller, writing for the court says:

> (1) "The general rule is that the authority of the court which first takes control of the subject-matter of litigation continues until it has finally and completely disposed of the matter, and no court of coordinate authority is at liberty to interfere with its action. Frazier *v.* Frazier, 61 App. D. C. 279, 61 F. (2d) 920, and cases there cited. See, also, Michigan Trust Co. *v.* Ferry, 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867; Slack *v.* Perrine, 9 App. D. C. 128, 153. Cf. dissenting opinion by Stone, J., Yarborough *v.* Yarborough, 290 U. S. 202, 213, 54 S. Ct. 181, 185, 78 L. Ed. 269, 90 A. L. R. 924.
>
> (2) Therefore, by retaining the cause for further orders, the North Carolina Court maintained its juris-

diction over the parties and subject-matter of the proceeding. It had authority to modify existing orders or enter new ones, respecting the support and care of the appellee, and to enforce such orders. The removal of the father's residence to the District of Columbia and the appellee's action in filing suit there did not oust the North Carolina Court of its jurisdiction. Slack *v.* Perrine, supra, 9 App. D. C. 128, at page 155. See, also, Michigan Trust Co. *v.* Ferry, supra; Burrowes *v.* Burrowes, 64 App. D. C. 392, 78 F. (2d) 742."

A careful reading of the case of *Barnes* v. *Lee,* 128 Oregon 655, 275 P. 661, cited by petitioner on page 13 of his brief, indicates that the Oregon Court is in accord with respondent's position both as to the question of res adjudicata as to all facts decided in the first trial and also on the proposition that the petitioner cannot obtain an advantage by his obvious attempt to change from one jurisdiction to another while violating the orders of the first jurisdiction. From page 662 (Pacific) we quote from the opinion:

"In the case of Griffin *v.* Griffin, 95 Or. 78, 84, 187 P. 598, 601, Justice Bean, speaking for the court, remarks:

'A judgment or decree of a court of one state awarding the custody of minor children in a divorce case is not res judicata in a proceeding in a court of another state, except as to facts and conditions before the court upon the rendition of the former decree.'"

From page 663:

"There was no disobedience of the order of the Oklahoma Court in Lee's coming to this state and bringing the child with him."

POINT 2.

The effect of the North Carolina judgment is determined by the laws of North Carolina and under the full faith and credit provision of the Constitution, and by comity, the local law in North Carolina was given recognition by the courts in the District of Columbia.

Decisions from the Supreme Court in North Carolina have been cited showing the law in that state regarding the right of its courts to award custody of children, either before or after the granting of a decree of divorce. The respondent contends that in applying the full faith and credit doctrine the North Carolina judgment is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. Article 4, Section 1, of the Constitution: 28 U. S. C. A. 687, *Adam* v. *Saenger*, 303 U. S. 62, 82 L. Ed. 651. This was held in *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26, as having been rightly interpreted by Congress to mean not some but full credit. It is conceded that this court has the right to determine what the law of North Carolina was and certainly the opinions quoted from the Supreme Court of that state are decisive.

It seems to us that the only position which the petitioner takes is that he desires to nullify and give no effect whatever to the North Carolina decree awarding custody, although he invoked the jurisdiction of that court.

POINT 3.

There is no question of substance presented under Section 237 B of the Judicial Code and applicable rule of court.

The petitioner claims that due process of law has been denied to him although he does not dispute the extent of his participating in the North Carolina litigation. Merely

to state the facts is to show that petitioner's position is untenable. There is nothing in the record to justify petitioner's contention that the District Court failed to grant him a full and and complete hearing. All that the District Court did was to refuse to permit old charges to be related after the said charges had been disposed of by the North Carolina order.

It is respectfully submitted that in the District Court the learned presiding Judge clearly had in mind the correct principles of law when he ruled at the beginning of the hearing as follows: "As I understand the law in this case, the judgment of the court in North Carolina is conclusive as to the situation as it existed at the time of that judgment. However, if it now appears that the interests of the children—and they are the only interests which the court should consider—requires any change in their custody, I think that the court has jurisdiction to make it" (R. 29).

On this proposition we submit that the United States Court of Appeals correctly ruled in writing as follows: "We think, therefore, that the District Court was right in holding itself bound, with respect to conditions at the date of the North Carolina court's order, by that court's findings. This is simply to say that we should not needlessly thresh over old straw, but should apply the doctrine of res judicata as far as the nature of the case permits" (R. 82).

In the case of *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, referring to rule 38 (5) of the Supreme Court rules, Mr. Justice Reed writing for the court says on page 206 (1292 L. Ed.):

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be

merely corollary to a permissible difference of opinion in the state courts."

In the case at bar, the principal thing before the District Court was to clearly interpret and give effect to the North Carolina judgment. There can be no doubt that this was correctly done and we respectfully submit that petitioner has failed to show error, or that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. In fact, no such showing was attempted by the petitioner.

Conclusion.

The mother in this case has litigated in the courts since May 9, 1941, for the custody of her two children. The record clearly sets out the history of the litigation as it has proceeded through the courts. We respectfully submit that, from the record, the facts are inescapable that the petitioner, who invoked the North Carolina Jurisdiction, is merely attempting to avoid the result of the judgment there rendered and subsequently upheld in the Courts of the District of Columbia.

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